IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER MILLER,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 00-6080
RICHLAND TOWNSHIP, RICHLAND TOWNSHIP BOARD OF SUPERVISORS, and J. LAYNE TURNER,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. NOVEMBER 21, 2001

Presently before this Court is the Motion for Summary Judgment filed by the Defendants, Richland Township (the "Township"), the Richland Township Board of Supervisors (the "Board"), and the zoning officer of the Township, J. Layne Turner ("Turner")(collectively the "Defendants"). The Plaintiff, Jennifer Miller ("Miller") claims that the Defendants violated her First Amendment rights and discriminated against her on the basis of her gender when they revoked her zoning permit for a retail clothing store.

I. BACKGROUND

On December 10, 1997, Jennifer-Lynn Cole ("Cole"), Miller's business associate, applied for and was issued a zoning permit to operate a store for the "retail sale of clothing" by the Township. On December 22, 1997, Cole applied for and was issued a sign permit for three signs for "Jenn's Clothes." However, the actual name used at the store was "Playmate Lingerie" and one of the signs erected thereon bore that moniker. One of the other signs stated "live

models inside." Hanover Blue, Inc. owned Playmate Lingerie and leased the retail space where the store operated. Miller is the President of Hanover Blue, Inc. The actual property is owned by Dr. Yung S. Kim, Ms. Elsie D. Te and Ms. Choong Ho Kim. The leased property is located in a Planned Commercial Zoning District in a strip mall in Richland Township, Quakertown, Pennsylvania.

On February 27, 1998, the Township issued a Notice of Violation and Cease and Desist Order to Playmate Lingerie. The Notice stated, *inter alia*, that Playmate Lingerie was in violation of the zoning ordinances because it was engaging in adult commercial uses which are not permitted in a Planned Commercial Zoning District. Although the Notice stated that Playmate Lingerie had the right to appeal the Notice, it did not do so. However, on April 17, 1998, Miller did meet with Turner's predecessor concerning the Notice and agreed not to sell erotic books and videos, not to play videos, and not to have models wear see-through lingerie without a bra and panties underneath. Then, on August 13, 1998, after evidence showed that Playmate Lingerie was still violating the zoning ordinances, Turner revoked the zoning permit. Turner concluded that the retail sale of clothing was not the only use being conducted on the premises. Turner found that live models were performing private "modeling" for customers, which is not listed as a use on the Zoning Permit Applications and is not permitted in a Planned Commercial Zoning District. Miller appealed the revocation and a Zoning Hearing Board meeting was held on October 21, 1998 to address her appeal. The Board upheld the revocation and held that, based on the evidence presented, Miller's use of the retail space was an adult

commercial use, specifically an adult cabaret.[1]

During the Zoning Hearing Board meeting, as evidence of the adult commercial use, the Defendants presented three private investigators who testified concerning their experiences at Playmate Lingerie. The private investigators had visited Playmate Lingerie on February 11, 1998, February 18, 1998, April 27, 1998, June 10, 1998 and October 15, 1998. Essentially each investigator testified that, during each visit to the store, the investigator was asked by one of the models if he wanted to purchase lingerie and have it modeled by the woman. The lingerie had to first be purchased for approximately forty dollars and then the modeling session to follow cost an additional forty dollars for fifteen minutes or sixty dollars for one-half hour. The investigator was then asked to sign a document stating, *inter alia*, that he would not be able to touch or date the model, or solicit her for prostitution. The investigator was then directed to a "dressing room" approximately seven feet by twelve feet in size which housed a lounge chair, a roll of paper towels, a wastebasket full of crumpled paper towels, and prior to the April 17, 1998 meeting, a television and V.C.R. The model then told the investigator that he must tip her an additional fifty to one hundred dollars because she was an independent contractor. After the money exchanged hands, the model danced for the investigator in the lingerie which the investigator had purchased. Often the lingerie chosen was crotchless and/or transparent. Except

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[1] The zoning ordinances define an adult cabaret as:

> [a] public or private establishment or place which, as a main part of their business, features, on a regular, at least weekly basis, live sex, topless dancers, stripers or similar entertainers, or any similar establishment to which access is limited to persons eighteen (18) years of age or older.

(Summ. J., Ex. G, 12-13).

for on October 15, 1998, the models did not wear bras and panties under the lingerie. Prior to April 17, 1998, in addition to dancing, the models also put a V.H.S. tape in the V.C.R. which featured the model "gyrating naked on a couch" and touching herself. (Mot. Summ. J., 6). According to the investigators, the models often stated that they could masturbate during the session and afterwards clean up with the paper towels.

The Zoning Hearing Board found that although the models wore lingerie, their genitals, pubic region, buttocks and breasts were nevertheless exposed. Furthermore, the Zoning Hearing Board determined that although the investigators did purchase the lingerie, they were required to ask to take the lingerie with them when they left, and that the modeling occurred only after the lingerie was purchased. The Zoning Hearing Board stated that "it appears clearly to the Board that any sale of lingerie is secondary to the main purpose of the establishment - attracting male customers for the purposes of observing woman in a nearly nude state of dress." (Mot. Summ. J., Ex. G, 14).

On January 7, 1999, Miller appealed the Zoning Hearing Board's decision to the Court of Common Pleas, however Miller did not take any further action in that case. On November 30, 2000, Miller filed the instant suit in this Court. On July 20, 2001, the parties appeared before this Court on Defendants' Motion to Extend the Application Deadlines due to Defendants' inability to depose Miller, to acquire the information requested in the Defendants' Request for Production of Documents, and to address Miller's failure to produce information. By Order, this Court extended the discovery deadline. On September 20, 2001, after Miller's further failure to produce documents, the Court granted the Defendants' Motion to Compel and for Sanctions. To date, Miller still has failed to produce the documents or any other evidence to

support the allegations in her Complaint. The instant Motion for Summary Judgment was filed on October 5, 2001.

II. STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party,

determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322;Wisniewski v. Johns-Manville Corp. , 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

A. First Amendment Claim

Miller has the burden of proving her *prima facie* case. Celotex, 477 U.S. at 322-23. Miller argues that modeling lingerie is a constitutionally protected form of expression and that the revocation of her zoning permit by the Defendants was in violation of her First Amendment Rights. According to Miller, the models at Playmate Lingerie were never naked, they did not strip, and they always wore a bra and panties. Miller alleges that the Defendants mislabeled the modeling as an adult use in order to shut Playmate Lingerie down. However, Miller presents absolutely no evidence other than her unsupported assertions that the above statements are true. As stated above, Miller cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams, 891 F.2d at 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). In fact, the uncontroverted evidence shows that models did dance for the customers in transparent and/or crotchless lingerie. Miller does not dispute the eye witness testimony of the private investigators and does not even mention them in her Response to the Motion for Summary Judgment.

Furthermore, Miller's own deposition testimony reveals that she did not know what the models did in the dressing rooms or if they danced for the customers. Miller also testified that she never asked the models what occurred in the dressing rooms. Miller stated that she only worked at the store ten to twenty hours a week, she never went into the dressing rooms, and she only remembered one of the names of the models. Miller further testified that she did not

remember any rules that governed the actions of the models, how long the modeling sessions lasted or whether she ever heard music or saw erotic videos. Miller's deposition testimony is replete with the response "I don't know." Therefore, in light of the complete lack of evidence provided by Miller and the evidence provided by the Defendants, it is apparent that there is no genuine issue of material fact concerning whether Playmate Lingerie was engaged in an adult use as defined by the zoning ordinances.

The United States Supreme Court has repeatedly upheld zoning ordinances similar to the one at issue here which regulates the locations in which adult establishments are able to operate. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 62 (1976). Zoning ordinances designed to combat the undesirable secondary effects of adult businesses are reviewed under the content neutral time, place and manner regulations. Young 427 U.S. 46. Here, it is undisputed that the zoning ordinance was specifically designed to combat secondary effects of adult businesses. Furthermore, the zoning ordinance provides alternative avenues of communication by permitting adult businesses to operate in Planned Industrial Districts. Miller alleges that the Planned Industrial Districts are "not amendable to commercial operations", however she does not provide any evidence that this is the case. (Compl., ¶ 18). In fact, Miller testified that she did not investigate sites within the Planned Industrial District and she did not remember if anyone else had investigated on behalf of Playmate Lingerie. In Young, the Court stated that:

> We have no doubt that the municipality may control the location of theaters, as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be disbursed throughout the city. The mere fact that the commercial

> exploitation of material protected by the First Amendment is subject to zoning and other licencing requirements is not a sufficient reason for invalidating these ordinances.

Young 427 U.S. at 70-71. Furthermore, In Renton, the Court rejected the respondent's arguments that the land set aside for adult theaters was unusable and thus was not an alternative avenue of communication. Specifically, the Court stated that:

> [t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," American Mini Theatres, 427 U.S. at 71, n. 35, 96 S. Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 96 S. Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Renton, 475 U.S. at 932. As in Young and Renton, the zoning ordinances at issue withstand scrutiny. Therefore, Miller's claim of a First Amendment violation must fail.

B. Gender Discrimination Claim

In her Complaint, Miller alleges that the Defendants targeted her business because she is a woman. Again Miller has provided absolutely no evidence to support this claim. In fact, while she testified that someone told her that her zoning permit was being revoked because she was a woman, she did not know when the comment was made, who made it, or even whether it was one of the Defendants who said it. Miller has not provided any direct or circumstantial

evidence that she was discriminated against because she was a woman. In her Response to the Motion for Summary Judgment, Miller points out that other stores that sold lingerie such as K-Mart, Wal-Mart, and Bon-Ton were not treated the same way as Playmate Lingerie. However, as discussed above, the sale of lingerie is not the defining issue in this case. What is at issue is erotic dancing in areas not zoned for such adult uses. Furthermore, Miller does not allege that she was treated differently from any males or that these stores were owned or run by males. Miller's claim is completely unsubstantiated and therefore must fail.

C. Latches

Lastly, Miller states in her Complaint, without support, that latches should have barred the Defendants from revoking her zoning permit because the store opened in December 1997 but the licence was not revoked until August 1998. Miller states in her Complaint that "[t]he Defendants had ample opportunity to claim a violation of the zoning ordinance when they made their prior complaints about the contents of the Plaintiff's signs and the peripheral items being sold at the store." (Compl., ¶ 12(e)). This argument is wholly without merit. "The doctrine of laches consists of two essential elements: (1) inexcusable delay in instituting suit; and (2) prejudice resulting to the defendant from such delay." Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1108 (3d Cir. 1996). Miller has made no showing that the Defendants' delay in revoking her licence was inexcusable nor has she shown that she has been prejudiced. First, Miller was made aware of the zoning violations as early as February 27, 1998 when she received the Notice of Violation and Cease and Desist Order. Second, "to establish prejudice, the party raising laches must demonstrate that the delay caused a disadvantage in asserting and establishing a claimed right or defense; the mere loss of what one

would have otherwise kept does not establish prejudice." U.S. Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 208 (3d Cir. 1999). Here, Miller claims that she was prejudiced because she continued to put money into the business which the Defendants knew was violating zoning ordinances. As stated above, this is not sufficient to establish prejudice. Id.; Com. ex rel. Baldwin v. Richard, 751 A.2d 647, 651 (Pa. 2000)(finding that proper evidence of prejudice included "establishing that a witness has died or become unavailable, that substantiating records were lost or destroyed, or that the defendant has changed his position in anticipation that the opposing party has waived his claims."). Therefore, Miller's claim of latches must fail.

D. Other Possible Claims

In their Motion for Summary Judgment, the Defendants, out of an abundance of caution, attempt to postulate what other causes of action Miller might be attempting to assert other than those which were specifically mentioned in the Complaint.[2] These arguments, which were actually raised by the Defendants, are also without merit. First, while Miller does not expressly allege it, to the extent that Miller attempts to establish an unlawful taking claim, it must fail. Miller, who is not the land owner, has not established that *her* property has been unlawfully taken or that any property has suffered even a significant drop in economic value. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981). Also, to the extent that Miller alleges a conspiracy claim, it is without merit as she has presented no evidence of a conspiracy to violate any of her rights. 42 U.S.C. § 1985(3); Isajewicz v. Bucks County Dep't of Communications, 851 F. Supp. 161 (E.D. Pa. 1994). To the extent that Miller alleges a Due Process violation, it is likewise without merit as Miller has not presented evidence that the Defendants committed any

[2] Miller filed her Complaint, *pro se*, although she subsequently retained counsel.

actionable violation or that their actions were arbitrary and irrational. Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 692 (3d. Cir. 1993).

IV. CONCLUSION

Miller's response to the Motion for Summary judgment simply alleges that there is sufficient evidence to support her claims. However, Miller does not actually produce any evidence, other than her unfounded assertions, to support her claims. Miller cannot establish a *prima facie* First Amendment or gender discrimination claim. Miller also cannot establish any of the other claims discussed above. Therefore, summary judgment in favor of the Defendants is warranted.

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Defendants.	:	

ORDER

AND NOW, this 21st day of November, 2001, upon consideration of the Motion for Summary Judgment (Dkt. No. 11), filed by Defendants and any Responses or Replies thereto, it is hereby ORDERED that the Motion for Summary Judgment is GRANTED and the Complaint is DISMISSED with prejudice. The Clerk of Court is hereby directed to mark this case as closed.

BY THE COURT:

Robert F. Kelly, Sr. J.